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Mr. Baker states that the purpose of the Sherman Act does not extend to the protection of foreign buyers against horizontal restraints by American firms who collaborate in selling abroad. The Webb-Pomerene exemption is largely unnecessary, partly because "most joint export arrangements could be carried out under the Sherman Act."[1] It is up to foreign governments, he argues, if they choose, to attack these arrangements. The Justice Department Memorandum embodies a similar idea.[2]

My paper indicates a belief that the Act applies to such restraints regardless of the nationality of the buyers affected, if the restraint of competition is carried out in the course of U.S. export commerce, or if it substantially affects such commerce. This "misses the real world," he says, and represents "vague internationalism."[3] Perhaps we do differ on our perception of the real world and of what constitutes good U.S. international policy. My paper, however, was an effort to state what the law is, or seems to be, as a guide to those who practice it. As I understand him, Mr. Baker does not argue that such arrangements do not fall within the reach of the Sherman Act: the issue is "not one of jurisdiction," he says.[4] Thus he agrees with the main part of my paper, though not discussing the particular tests of jurisdiction which I undertake to state.

The point stands, therefore, that the courts may examine under the Sherman Act the legality of market allocation, price fixing, boycotts, tying arrangements and other restraints upon foreign buyers, if carried on by American exporters, absent a Webb-Pomerene exemption. This

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1. Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16, 28 (1974).
2. *Justice Department Memorandum, reprinted in* 5 CCH TRADE REG. REP. ¶ 50,129, at 55,208 (1974).
3. Baker, *supra* note 1, at 34, 35.
4. *Id.* at 37.

application of the law may be made in private suits and Federal Trade Commission proceedings, even where the Justice Department decides not to act—a major circumstance not discussed in Mr. Baker's paper. Since these papers were written, a District Judge in a private suit, *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*,[5] has held the Act applicable and violated where an American exporter was carrying out a plan of territorial confinement of American and foreign distributors, the anti-competitive impact of which, insofar as plaintiff was concerned, was upon foreign buyers in a foreign market.

The question remains as to what kind of rules will apply. I do not disagree that reasonableness tests might be appropriate in some cases where per se rules would be applied in similar cases domestically, although I know of no case which supports this. But I have difficulty in understanding Mr. Baker's concept of reasonableness. He indicates that under the rule of reason, one may justify what would otherwise be prohibited, where this will serve the "national interest" in increasing exports, and combatting foreign cartels and other foreign market obstacles. It is here that I think the *Timken* case relevant.[6] To me, it holds that the concern of the Act is with protecting competition in foreign commerce and that the Act does not permit justification of restraints of competition on the ground that such restraints would be more effective in doing business abroad. If that is not the holding, the point remains that decades of interpretation in other cases have ruled out the argument that the Act should not be applied because some other system besides competition arguably would work better.

The idea that the United States should tolerate export cartels formed at home to prey upon foreign markets, and leave it to foreigners to protect themselves, provided there is no domestic "spillover," raises many objections. First, "spillover" is difficult to avoid in the "real world," and an antitrust policy which encourages it invites some serious problems. Second, the idea overlooks the presence of many American firms and individuals in foreign markets. Thus, there may be "foreign spillover" onto the Americans Mr. Baker wishes to protect. Third, other nations, both developed and developing, may have no practical antitrust remedy. It is far easier to stop restraint at its source than to

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5. 375 F. Supp. 610 (E.D. Penn. 1974), *findings amended*, 5 CCH TRADE REG. REP. (1974-1 Trade Cas.) ¶ 75,359.

6. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). *See* Rahl, *American Antitrust and Foreign Operations: What is Covered?*, CORNELL INT'L L.J. 1, 9 (1974); Baker, *supra* note 1, at 35-7.

overcome the complex problems of obtaining personal jurisdiction over foreign parties and of writing and enforcing decrees for them.

Fourth, such a U.S. policy on the part of the nation claiming to be the great proponent of antitrust invites costly emulation. Our Webb-Pomerene Act is often used as an excuse for foreign toleration of export cartels, and I should think that Mr. Baker's views will provide further justification. Fifth, such a policy invites retaliation, as Mr. Baker himself illustrates by defending under some circumstances American buying groups formed to counteract foreign export cartels.[7]

We can attack the foreign cartels under our law, and they can attack ours. But why encourage their formation in the first place? And how would we look attacking a foreign buying group formed to protect against an American export cartel formed with our blessing? This seems neither a pretty picture, nor a policy which will serve well the national interest.

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7. Baker, *supra* note 1, at 25.